United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7591 & 77-7016

To be argued by
Norman Leonard Cousins

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P/S

United States Court of Appeals

For the Second Circuit.

ISRAEL AIRCAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN and DALIA KOREN,

Plaintiffs,

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, MORDECHAI MUSCATEL and HAGAI KOREN,

Plaintiffs-Appellants,

v.

STANDARD PRECISION A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY and NORTH AMERICAN ROCKWELL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of Plaintiffs-Appellants, Zohar Landau, Mordechai Muscatel and Hagai Koren.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

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ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, NIRA LANDAU, MORDECHAI MUSCATEL, ZILA MUSCATEL, HAGAI KOREN and DALIA KOREN,

Plaintiffs,

ISRAEL AIRCRAFT INDUSTRIES, LTD., ZOHAR LANDAU, MORDECHAI MUSCATEL and HAGAI KOREN,

Plaintiffs-Appellants,

-against-

STANDARD PRECISION, A DIVISION OF ELECTRONIC COMMUNICATIONS, INC., ELECTRONIC COMMUNICATIONS, INC., THE NATIONAL CASH REGISTER COMPANY and NORTH AMERICAN ROCKWELL CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

- -X

BRIEF OF PLAINTIFFS-APPELLANTS, ZOHAR LANDAU, MORDECHAI MUSCATEL AND HAGAI KOREN.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

(1) Were the plaintiff crewmembers required to plead either release or Workmen's Compensation as part of their complaint?

(2) Did the crewmembers fully and fairly apprise the defendants of all they wanted to know about the crewmembers' agreements with their employer?

(3) Did the crewmembers, their attorneys of record, or their trial counsel deceive, knowingly misrepresent or perpetrate a fraud on anyone?

(4) Should the crewmembers be punished for the errors or omissions of their employer?

STATEMENT OF THE CASE.

On January 21, 1970 an Israel Aircraft Industries' jet manufactured by North American Rockwell Corporation crashed in Israel. Its crew - all of whom were employees of Israel Aircraft engaged in the course of their employment at the time - bailed out just before impact and were injured (140a-146a).

The injuries to the crewmembers were so devastating (especially to Zohar Landau and Mordechai Muscatel), that the jury awarded them $425,000.00 ($275,000.00 to Zohar Landau, $135,000.00 to Mordechai Muscatel and $15,000.00 to Hagai Koren) (211a). Post-trial motions to set the verdicts aside as excessive were denied by the Court below (194a).

Plaintiffs' theory of liability was that Standard Precision had manufactured a defective flap drive actuator for the plane, which failed in flight, causing a malfunction of the wing flaps and resultant loss of control of the aircraft necessitating its abandonment (146a-148a, 210a).

Standard Precision's defense was that Israel Aircraft had removed a shear pin from the flap drive system which permitted excessive loads to be applied to the flap drive actuator, precipitating its failure (148a-149a).

The jury, apparently finding merit to both side's contentions, found Israel Aircraft 65% responsible for the accident and Standard Precision 35%. North American Rockwell was found not liable (211a). This was done pursuant to the comparative negligence law of Israel which the Court below properly applied to the trial of this action. The issue of the individual crewmembers' contributory negligence was not submitted to the jury as there was no evidence upon which a finding of contributory negligence could be made.

In this litigation Landau, Muscatel and Koren are sueing for their personal injuries. Israel Aircraft is sueing for the loss of its aircraft. The loss of services claims of the crewmembers' wives (Nira Landau, Zila Muscatel and Dalia Koren) were dismissed by the Trial Court on the grounds that Israel does not recognize such a cause of action (210a).

Defendants' answer to plaintiffs' amended complaint was served on Condon & Forsyth on July 5, 1973. In its answer to the plaintiffs' amended complaint defendants counterclaimed against Israel Aircraft for indemnity and/or

contribution towards any damages which defendants might have to pay the crewmembers. Israel Aircraft raised no affirmative defenses thereto (54a-57a, 451a-452a).

With the jury verdicts in on both liability and damages, and with defendants' post-trial motions denied, Israel Aircraft moved for the first time on March 30, 1976 for an order dismissing the defendants' counterclaims against Israel Aircraft or reducing the crewmembers' recoveries by 65%. The basis for the motion was Israel Aircraft's "newly discovered" claim that the crewmembers had given their employer "releases" in 1970 and 1971 which effectively barred any counterclaim by defendants against Israel Aircraft (211a-212a).

The crewmembers opposed Israel Aircraft's motion on the grounds, *inter alia*, of inexcusable laches on the part of Israel Aircraft and extreme prejudice to the crewmembers. Federal Rules of Civil Procedure 8(c) required Israel Aircraft to plead these "releases" in reply to defendants' counterclaim in 1973. It was unconscionable that Israel Aircraft should have possession of those "releases" for almost six years without pleading them and then raise them for the first time as a defense after the trial was over because it was not happy with the jury's verdicts (450a-461a).

Having been awakened by Israel Aircraft's belated motion, defendants cross-moved for an order dismissing the crewmembers' claims in toto on the grounds that whatever "releases" Israel Aircraft had from the crewmembers were General Releases which defendants were entitled to raise as a complete defense to all crewmembers' claims (April 19, 1976) (196a-205a, 480a-493a).

The crewmembers opposed defendants' cross-motion on the grounds that these "releases" or agreements were not newly discovered evidence; that defendants were apprised of them during depositions and discovery and should have moved to amend their answers to plead release as an affirmative defense well before trial; and that at *no time* were the agreements intended by anyone to be or act as General Releases (505a-543a).

The District Court (Carter, D.J.) decided, *sua sponte*, that each and every one of the plaintiffs (both individual and corporate) *and* their attorneys *and* their trial counsel had knowingly, wilfully and deliberately perpetrated a fraud upon the Court and the defendants in this case. It thereupon set aside the jury verdicts rendered herein and dismissed the claims of not only the crewmembers for their personal injuries, but also that of Israel Aircraft for the loss of its aircraft (209a-225a).

That act was more than just completely wrong and uncalled for. It was a needless and unfounded attack upon the integrity and reputation of two fine law firms and their trial counsel who heretofore had enjoyed good standing before the bar of both the Second U.S. Circuit Court of Appeals and the United States Supreme Court. Its accusations spread all over the front page of the New York Law Journal (Oct. 29, 1976) and officially reported at 72 F.R.D. 456 have inflicted damage and embarrassment upon professional attorneys far beyond the confines of this lawsuit.

In dismissing the plaintiffs' complaint the District Court made it clear it was not passing on either the validity or effect of the agreements between the crewmembers and their employer, but was dismissing because of plaintiffs' failure to disclose them (218a).

Plaintiffs' motions for renewal, reargument and reconsideration accompanied by sworn affidavits of each of the plaintiffs as well as their counsel were to no avail. The District Court adhered to its original decision in an opinion dated Jan. 4, 1977, again refusing to consider either the validity or effect of the subject agreements (344a).

The crewmembers appeal from the lower Court's original decision of Oct. 26, 1976 as well as its decision of Jan. 4, 1977 (336a, 348a).

ARGUMENT.

POINT I.

THE CREWMEMBERS HAD NO OBLIGATION TO PLEAD EITHER RELEASE OR WORKMEN'S COMPENSATION AS PART OF THEIR COMPLAINT.

Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain, *inter alia*, "a short and plain statement of the claim showing that the pleader is entitled to relief." There is no requirement, nor has any case held, that a party injured at work allege that he has received Workmen's Compensation or made claim against his employer (or, indeed, anyone else). Nothing in FRCP 9 (Pleading Special Matters) requires such an averment.

Payment, release, accord and satisfaction, estoppel, injury by fellow servant, waiver, "any any other matter constituting an avoidance or affirmative defense" are all affirmative defenses which must be raised "in pleading to a preceding pleading" (FRCP 8[c]). A complaint does not respond to a preceding pleading. *A fortiorari*, it need not aver either the existence or non-existence of any payment or release.

The Court below seemed to recognize that these things need not be pleaded (224a) yet regarded plaintiffs' failure to do so as part of a conscious effort to defraud the Court and the defendants (222a, 224a-225a). It is

respectfully submitted that the non-performance of an unrequired act can not and should not be construed as fraud.

Though not required to do so, plaintiffs specifically alleged that the crewmembers were injured in the course and scope of their employment by Israel Aircraft in paragraphs 26-30 of their amended complaint (10a). On Dec. 31, 1974 the parties stipulated thereto (144a). The allegations in plaintiffs' complaint of an Israeli accident arising out of Israeli employment were more than adequate to put the defendants on notice to inquire into and investigate the existence or non-existence of any Workmen's Compensation system in Israel as well as the nature and legal effect of any payments that were made and agreements that were entered into.

POINT II.

THE CREWMEMBERS FULLY AND FAIRLY APPRISED THE DEFENDANTS OF ALL THEY WANTED TO KNOW ABOUT THE CREWMEMBERS SETTLEMENT AGREEMENTS WITH THEIR EMPLOYER.

While the Federal Rules of Civil Procedure contemplate full and open disclosure, they do not require a party to tell his adversary what questions to ask at a deposition, what interrogatories to propound or what documents to seek. Nor must a party tell his adversary what legal research to undertake.

Although defendants knew from plaintiffs' complaint and from information furnished by Israel Aircraft that the crewmembers had been injured on the job and had received payments from Israel Aircraft pursuant to an agreement between them, defendants made no effort whatever to explore the nature or legal effect of either the payments or the agreements.

Hagai Koren's deposition, for example, covered 109 pages. It was held in New York on Sept. 5, 1974. Mr. Koren flew in from Israel especially for it. Though conducted in a relaxed and unobstructed atmosphere at the offices of defendants' attorneys, not one question was asked of Mr. Koren by defense counsel regarding his claims against Israel Aircraft, payments received by him from it, or agreements entered into between them. In short, the entire subject was ignored by defendants.

Mordechai Muscatel flew to New York for his deposition which was held at the offices of defendants' attorneys on July 24, 1974. Though covering only 44 pages, it, too, was conducted in a relaxed atmosphere, totally unobstructed by plaintiffs' counsel.

At page 35 of his deposition, Mr. Muscatel was asked,

> Q Is there an agreement with your employer, I. A. I., that you must pay them back money they have paid you if you receive money in this lawsuit?

A Yes.

Q Can you tell me how much money you received in benefits or pensions as a result of these injuries up to the present time?

A Yes, I've got 10,000 pounds.

Q Was that a single payment from your employer?

A Single time, once.

At page 40 of his deposition, Mr. Muscatel was asked,

Q Can you tell us what the 10,000 pounds lump sum payment you received from I. A. I. represented?

A I think there was an agreement between me and I. A. I. to get that sum of money because of what happened to me.

Q Does the sum of money have some relationship to -- let me withdraw that.

Was this money paid to you as a result of your injuries sustained in this accident?

A Yes.

Q Pursuant to the agreement between yourself and I. A. I., this money must be repaid to them out of any you might get as a result of this lawsuit?

A Yes (535a).

Each and every one of those answers was 100% true - then and now. There was nothing evasive or misleading about them. Israel Aircraft told the crewmembers they would have to repay the money received from it to their employer in the event of a successful recovery by the crewmembers against the defendants herein. The crewmembers conveyed that information to Fuchsberg & Fuchsberg when they retained that law firm on July 16, 1974. Fuchsberg & Fuchsberg (per Norman L. Cousins, Esq.) sought confirmation thereof from Condon & Forsyth who (per William L. Schierberl, Esq.) on behalf of Israel Aircraft, confirmed those facts both orally and, later, in writing (252a-253a). To this day, Israel Aircraft has never denied claiming a right to such repayment.

Despite being specifically informed by Mr. Muscatel and Israel Aircraft of the existence of an agreement between the two, defense counsel did not inquire into its nature, its terms, whether or not it was in writing, or oral, or both, or whether it was the result of suit, settlement, or otherwise. No demand for production of the agreement or its terms was ever made by the defendants.

The District Court found that Mr. Muscatel's answers at his deposition mislead the defendants into believing "that the payments were in the nature of Workmen's Compensation, which would not require a release and which

would not bar or limit an action against a party other than the employer" (215a). First of all, neither Mr. Muscatel nor his attorney made any attempt to characterize the payments. Secondly, defense counsel already knew (as plaintiffs' counsel did not) that there was no Workmen's Compensation Law in Israel and that "an employee in Israel has a right to sue his employer for negligence" (482a). Hence, Muscatel's answers, which were absolutely true, could not possibly have mislead the defendants.

Zohar Landau's deposition was held in New York on July 22, 1974. It covered 107 pages. Pages 86, 87, 98 and 99 concerned monies received by Landau from Israel Aircraft as a result of the accident. Though advised by the witness that he had received 75,000 pounds from his employer, defense counsel made no inquiry into its nature, the reasons therefor, whether a release had been given for it, whether a suit or administrative proceeding against Israel Aircraft had been instituted, whether any agreement or understanding surrounded it, or whether there was any writing concerning it (532a-534a).

If the crewmembers had denied receiving money from Israel Aircraft, or if Muscatel had denied, when asked, that he had an agreement with Israel Aircraft, then there might have been some basis for the District Court's holding. But on the record before this Court, there is not one scintilla of evidence to support the District Court's conclusion.

The District Court found that "Muscatel's deposition answers betray a lack of candor that cannot be tolerated of a litigant" (219a). Which answers "betray a lack of candor" the District Court does not say. What it expects of Mr. Muscatel the Court below does not say. Mr. Muscatel is not a lawyer, has no legal background or training, and does not speak or understand English. (His entire deposition and trial testimony were taken through an Hebrew interpreter.) He answered each question put to him as best as he could and - to this writer's knowledge - as honestly as he could. The fact that his obligation to reimburse his employer the money it had paid him was not set forth in the Deed of Release and Full and Final Accord does not mean that it isn't real and binding (It *is!*); it just means that it wasn't set forth in that document. Had defendants not conducted such superficial depositions and discovery, they undoubtedly would have learned that.

The District Court found similar faults with plaintiffs' responses to defendants' inquiries concerning Landau and Muscatel (216a, 219a-220a). The lower Court's criticisms, however, are without merit. No lawsuit, claim or administrative proceeding was ever commenced against Israel Aircraft by the crewmembers, who were not even represented by legal counsel. Israel Aircraft was

under no obligation to pay the crewmembers anything and no judgment, award or decree required it to. The term "ex gratia" used by Israel Aircraft's attorneys is defined in Black's Law Dictionary to mean, "out of grace; as a matter of grace, favor, or indulgence; gratuitous. A term applied to anything accorded as a favor; as distinguished from that which may be demanded *ex debito*, as a matter of right." (4th ed.) The small payments the crewmembers received from Israel Aircraft were wholly gratuitous. Israel Aircraft has been absolved from any responsibility for the loss of its aircraft by the Israel Civil Aeronautics Board. Payments were conditioned, however, on the money being repaid out of any proceeds recovered in the lawsuit herein. The mere fact that Deeds of Release drafted by Israel Aircraft's attorneys were given by the crewmembers doesn't make the payments any less gratuitous; nor does the term "ex gratia" necessarily imply that releases therefor were not given. Even under New York law, if a plaintiff settles with one of two tortfeasors and gives him a General Release and at the trial of the second tortfeasor the settling tortfeasor is absolved from any responsibility, he can't return his General Release to the plaintiff and get his money back. His payment is held to be gratuitous, but final. The mere fact that Israel Aircraft's payments to the crewmembers were "ex gratia" or gratuitous gives no rise

whatever to an inference that no consideration therefor was received (especially when Mordechai Muscatel testified to the existence of an agreement concerning the payments).

Lastly, the Court below criticizes the plaintiffs for failing to turn over the Deeds in response to item 11 of defendants' Demand for Production of Documents (214a-215a, 218a-219a). Item 11 has nothing to do with releases, deeds, agreements, or anything concerning the settlement Israel Aircraft made with its employees. It concerned payroll, medical, hiring, training and work records of the crewmembers and other similar items (214a).

Rule 34(b) of the Federal Rules of Civil Procedure requires Requests for the Production of Documents and Things to "describe each item and category with reasonable particularity." Defendants' notice failed in that regard. Defendants knew that each of the crewmembers had received some form of settlement payment from Israel Aircraft and knew from Muscatel's deposition that the monies were paid pursuant to an agreement. There was no excuse for defendants not specifically requesting (1) copies of the agreements concerning the payments, (2) copies of any releases or other documents given in exchange for the payments, or (3) simply, all writings concerning payments to the crewmembers and their obligations to repay them.

Contrary to the findings of the Court below (219a), item 11 of defendants' demand did not require the production of the crewmembers' Deeds (214a). Insertion of the words, "all personnel records" and "including but not limited to," did not enhance the demand's efficacy in any way; for it is the principle of ejusdem generis that, where general words follow an enumeration of things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to things of the same general kind or class as those specifically mentioned (Black's Law Dictionary 4th ed.; *Goldsmith v. U. S.*, 42 F. 2d 133, 137). See, also, 4A Moore's Federal Practice 34.07 and cases cited therein.

Whether a reasonable man would know that the crewmembers' Deeds were called for by item 11 of defendants' demand (especially when plaintiffs' counsel didn't even know they existed) as the District Court so held, is, at most, an arguable issue. *Id.*, p. 34-56. But to find the plaintiffs and their attorneys guilty of willful fraud because of their inability to read the defendants' minds is an abuse of discretion beyond the bounds of judicial propriety.

Contrary to the District Court's holding (220a) that, "defendants had no way of knowing what information and documents were being withheld," defendants' failure

to learn of the crewmembers' Deeds was not because of plaintiffs' failure to disclose. It was wholly because of defendants' lax and superficial pre-trial discovery. Questions which should have been asked at the crewmembers' depositions were not asked. Interrogatories which should have been served were not served. Documents which should have been demanded were not demanded. Defendants took nine depositions of Israel Aircraft personnel, yet questioned not one of them about the crewmembers' settlements, the terms thereof, or any documents pertaining thereto. For the Court below to impose on plaintiffs a burden properly belonging to the defendants and then to dismiss plaintiffs' complaint for failing to conduct defendants' discovery for them is an abuse of discretion which should not be tolerated by this Court.

POINT III.

AT NO TIME DID THE CREWMEMBERS, THEIR ATTORNEYS OF RECORD OR THEIR TRIAL COUNSEL DECEIVE, KNOWINGLY MISREPRESENT OR PERPETRATE A FRAUD ON ANYONE.

Instead of labeling the plaintiffs and their attorneys, carte blanche, as crooks (Black's Law Dictionary 4th ed.), the District Court might have taken the trouble to ask, who first brought these Deeds of Release to light, and was his doing so consistent with the perpetration of a fraud.

The Deeds of Release and Full and Final Accord first came to light when Zohar Landau, the most seriously injured of the crewmembers, approached Norman Cousins during the damage trial and informed him that he had just been told by one of the Israel Aircraft personnel that he may have signed a document which might affect his case against the defendants (258a-259a). None of the documents turned over to Fuchsberg & Fuchsberg by Condon & Forsyth when Fuchsberg & Fuchsberg took over the representation of the crewmembers in 1974 indicated or made reference to any such thing (253a). Nevertheless, Mr. Cousins didn't tell his client to forget it or keep quiet about it, as the decision of the Court below implies (223a). On the contrary. At the first opportunity this writer went directly to Israel Aircraft's attorney William L. Schierberl and asked him, point blank, if Israel Aircraft had any releases or other documents from the crewmembers which might affect their rights against the defendants. Schierberl assured this writer that he had no such documents and that as far as he knew there were none (259a). Schierberl confirms this in his own affidavit (227a). In addition, he promised to check with his client and advise if he learned anything to the contrary, but his "advice" was not forthcoming until after the second trial was over (324a).

Who was a better source of information for this writer to go to? Schierberl not only represented Israel Aircraft throughout the litigation (who should know whether or not it had any releases from the crewmembers), but prior to July 23, 1974 he had also represented the crewmembers (252a, 281a).

No one had more to lose by the revelation of General Releases than Zohar Landau and his attorney Norman L. Cousins. Yet if larceny was in their hearts or fraud their motive, why in heaven's name would they bring up something which obviously no one else knew about and which the crewmembers and their attorneys could only benefit from by concealing? If the District Court had only asked that question before condemning people wholesale, we would probably not be before this Court now.

As stated in *Lanzi v. Brooks*, A. D. 2d , 388 N. Y. S. 2d 946 (3rd Dept. 1976) fraud requires (1) misrepresentation of a material fact; (2) falsity; (3) scienter; (4) deception; and (5) injury. Absent proof of any one of these elements, there is no fraud. In the case at bar there is no proof of any of these elements. What we have is a District Court judge who does not believe anyone (345a-346a).

Twice the District Court found it "outrageous that the crewmembers, having already settled at least a portion

of their claims, should come into this Court and ask to be fully compensated for their injuries" (223a, 346a).

Has the Court below never heard of Workmen's Compensation? Does it not know that thousands of lawsuits a week are filed in Courts seeking full recovery for persons injured on the job where partial compensation has been received from plaintiff's employer? In New York, Section 29 of the Workmen's Compensation Law specifically provides by statute for the maintenance of a third party action *in addition* to benefits received from the plaintiff's employer. Cases recognizing that right are almost too numerous to mention. See, just for example, *Clark v. Monarch Engineering Co.*, 129 Misc. 145, 221 N. Y. S. 93, aff'd 222 App. Div. 713, 224 N. Y. S. 793, aff'd 243 N. Y. 107, 161 N. E. 436 and *Bagnel v. Springfield Sand & Tile Co*, 144 F. 2d 65, cert. denied 65 S. Ct. 72, 323 U. S. 735, 89 L. Ed. 589. *Nelson v. Dykes Lumber Co., Inc.*, A. D. 2d , 383 N. Y. S. 2d 335 (1st Dept. 1976) not only reaffirmed the right of an injured employee who has received Compensation to maintain a third party action, but specifically stated "that an employer can be liable in a third-party action involving injury to an employee even though the employer could not have been sued directly by the employee" (citing cases). This is the exact situation we have here.

It is of no moment that Israel does or does not have a Workmen's Compensation system similar to that which exists in the United States. What *is* important is that all monies received by the crewmembers from their employer must be repaid out of any proceeds recovered in this litigation. Regardless of whether that obligation was imposed orally, in writing, or by law (as it is in the U. S.), it is an obligation which must be satisfied. The crewmembers will not be compensated twice for their injuries, and there is nothing "outrageous" whatever about them having brought this suit.

POINT IV.

THE CREWMEMBERS SHOULD NOT BE PUNISHED FOR THE ERRORS OR OMISSIONS OF THEIR EMPLOYER.

When Israel Aircraft moved post-trial to dismiss defendants' counterclaims, the District Court had a right to be angry. If Israel Aircraft felt it had a Workmen's Compensation defense to defendants' counterclaims, as Schierberl indicates at 231a, it had an obligation to plead that as an affirmative defense in its reply to defendants' counterclaims long before trial. *Murray v. City of New York,* A. D. 2d , 388 N. Y. S. 2d 343 (2nd Dept. 1976). If Israel Aircraft had a release from the crewmembers which was a defense to defendants' counterclaims, it was required by Rule 8(c) of the Federal Rules of Civil Procedure to plead it.

The fault with the reasoning of the Court below is that it failed to distinguish between acts and omissions of Israel Aircraft and its counsel from those of the crewmembers. The attitude of the Court below was, "a plague on both your houses," and that was wrong.

When Fuchsberg & Fuchsberg was substituted for Condon & Forsyth as counsel for the crewmembers in July of 1974, Condon & Forsyth turned over what it represented to be a complete copy of everything it had in its files in this case. Each and every one of the papers contained therein was carefully examined by this writer. No Deeds of Full and Final Accord were contained therein nor was there any reference to them (253a).

When defendants served a demand for the production of the crewmembers' personnel files on Condon & Forsyth, Schierberl did not produce the Deeds of Release because he did not know they existed and therefore could not have known they were in the crewmembers' personnel files (230a-231a). But whether he knew it or not, they were, in fact, in the crewmembers' personnel files at Israel Aircraft the whole time; and the only reason they were not then produced is because Condon & Forsyth never asked Israel Aircraft for the files (299a, 304a-307a). The error of the Court below was in visiting upon the crewmembers and their attorneys the errors and omissions of

their co-plaintiff. Mr. Justice Hammer said in *Slonim v. Schroeder*, Supreme Court Queens County Index No. 10594/72, attached hereto, that one defendant "should not be prejudiced as a result of the alleged recalcitrance of his co-defendant." Is this any less true for co-plaintiffs?

The Court below said that plaintiffs may not now change the theory of their case (218a-219a). The crewmembers are not attempting to; only Israel Aircraft is doing that. The crewmembers aren't seeking to amend their pleadings; Israel Aircraft is. The crewmembers haven't said the agreements they signed meant one thing and now they mean something else. That's Israel Aircraft's doing. Indeed, the only parties who did not seek to change their position when this writer brought these Deeds to light are the crewmembers. Whey should *they* be punished by a dismissal of their complaint?

Twice the Court below equated an engineering degree with a law degree (223a, 345a), and charged the crewmembers with knowledge that even Israel Aircraft's expert attorneys did not have (304a). At the time of and in the period immediately following their accident, the crewmembers were not represented by legal counsel. None was experienced in legal matters or accident claims procedures. All they knew of the agreements they had signed

and their effect was what they were told by Israel Aircraft and its attorneys (268a-277a). The truth of that is confirmed by Israel Aircraft's General Counsel and Vice President Herzela Ron (301a-304a). If the Deeds of Release drawn by Israel Aircraft said they released only Israel Aircraft and the Ministry of Defense and the crewmembers were specifically told by their employer and its attorneys that it would have no effect on their right to sue and collect full damages from the responsible parties, how can the crewmembers be charged with knowing that "a release to one is a release to all"? This writer was in his second semester of CONTRACTS before he ever heard of such a proposition. It is a principle of law so contrary to lay expectation and common sense that it has been abolished not only by statute (General Obligations Law 15-108) but by case law. (*Rosano v. Lustgarten*, A. D. 2d , 387 N. Y. S. 2d 886 [2nd Dept. 1976]). It is of little moment on this appeal whether the information the crewmembers received from their employer was correct. That is an issue which the District Court has expressly refused to consider (344a). What is important is that these *sua sponte* "convictions" for fraud be not permitted to stand because three honest laymen believed the words in a legal document and the explanations which accompanied them.

CONCLUSION.

The orders appealed from should be reversed and the matter remanded to the District Court before a different judge for a determination on the merits of the issues raised by Israel Aircraft and defendants' post-trial motions, the crewmembers' opposition thereto, and the effect and validity, if any, to be given to the agreements under review.

Respectfully submitted,

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ADDENDUM.

SUPREME COURT,

QUEENS COUNTY,

Special Term, Part I.

DATED: October 9, 1974

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IRVING SLONIM, etc.,

vs.

DAVE SCHROEDER, *et al.*

Index No. 10594/72.

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BY: HAMMER, J.

In this wrongful death action, defendants move for an order granting discovery and inspection of income tax returns of plaintiff's intestate for the five years prior to his death; all records of money paid by him to his mother and brother, including cancelled checks, for the five years prior to his death; and all policies of insurance on his life along with applications therefor.

Plaintiff resists principally on the ground that the present application is barred by a stipulation entered into by the parties when defendant Tom Mitchell failed to appear for examination before trial. On that occasion

defendants' attorney agreed not to make use of plaintiff's deposition until such time as defendant Mitchell appeared for examination. Plaintiff now contends that the existence of the items sought herein was elicited from plaintiff at his examination, and that discovery should, therefore, be disallowed at least until after defendant Mitchell appears for examination.

Plaintiff's argument is untenable. In the first place, the production by plaintiff of income tax returns and records of support payments was demanded in the original notice of examination. Further, the prohibition of the stipulation was clearly intended to embrace the use of plaintiff's deposition as evidence at the trial or upon the hearing of a motion, as "use of deposition" is defined in CPLR 3117. It was not intended to preclude defendants from utilizing any knowledge gained at the examination in the preparation of their defense. Finally, plaintiff is not without his remedies should defendant continue to avoid the taking of his deposition. *In any case, defendant Schroeder should not be prejudiced as a result of the alleged recalcitrance of his codefendant.*

Plaintiff has no additional objection to the production of records of moneys paid by the decedent to his mother and brother during the period between the death

of decedent's father and his own death, and discovery is granted accordingly. Plaintiff concedes that no money was contributed prior to this period.

Plaintiff further agrees in principle to the production of applications for life insurance policies completed by decedent and discovery thereof is granted. Discovery is denied, however, as to the policies themselves.

The motion with regard to the tax returns is denied. In the absence of a showing of necessity, the courts will not generally order disclosure of income tax returns. (*Gottlieb v. Friedman*, 42 A. D. 2d 965; *Fugazy v. Time, Inc.*, 24 A. D. 2d 443; *Glenmark, Inc. v. Carity*, 22 A. D. 2d 680, app. dsmd. 15 N. Y. 2d 956; 3 Weinstein-Korn-Miller, N. Y. Civ. Prac., par. 3101.10.) The court is cognizant that in a death action the decedent's earning capacity is an element to be considered relative to damages, and that his past income is probative of his future earning ability. Nonetheless, discovery of past tax returns ought not to be granted as a matter of course in a death action without some additional demonstration of special circumstances. (*Gasser v. Olin's Car Rental, Inc.*, N.Y.L.J., Dec. 9, 1969, p. 2, col. 5.)

Where a decedent had been self-employed, tax returns may well be the only reliable source of income information. (Cf. *Gilligan v. Lepone*, 31 A. D. 2d 630; *Coleman v. Myers*,

29 A. D. 2d 727; *Katz v. Memoli*, 28 A. D. 2d 1128.) However, where, as in the present case, the decedent had been a salaried employee at all times prior to his death and had no other source of income, and in the absence of some showing that the information sought through inspection of returns could not be obtained from the decedent's former employers, then discovery of the tax returns should not be granted. (See *Di Biasso v. Gonsenhauer*, 36 Misc. 2d 799.)

Plaintiff shall serve copies of the items of which discovery has above been allowed within 10 days of service upon him of a copy of the order to be entered hereon with notice of entry.

Settle order.

J. S. C.

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hereby admitted this day
of Morales v Mount
Alfonso Motion , 197
May 2, 1977)

Attorney for

Service of two 2 copies of
the within is
hereby admitted this 2nd day
of May , 1977.
Hale Russell Gray Seaman & Birkett
Attorneys for IAI
Attorney for

Service of two 2 copies of
the within is
hereby admitted this day
of , 197

Attorney for